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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LAURA COLBURN et al., Plaintiffs and Appellants, v. ALBERTSON'S, INC., et al., Defendants and Respondents.	B185198 (Los Angeles County Super. Ct. No. BC299391)

APPEAL from an order of the Superior Court of Los Angeles County, Lee Smalley Edmon, Judge. Affirmed.

Webster, Mrak & Blumberg, Joseph H. Webster and Richard P. Blumberg, both admitted pro hac vice; Gilbert & Sackman, Joseph L. Paller Jr. and Ian D. Thompson for Plaintiffs and Appellants.

Jones Day-Los Angeles, Harry I. Johnson, III and Jill A. Porcaro; Jones Day-Washington, D.C., Glen D. Nager and Alison B. Marshall, admitted pro hac vice, for Defendants and Respondents.

We here consider whether a trial court can certify a class comprised of individuals who were *not* subjected to a common practice of the defendant, but assert commonality in that they all swore they suffered similar losses caused by the defendant. As the trial court properly denied certification, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Between March 1996 and October 1997, ten federal and state lawsuits were filed alleging improper employment practices at Albertsons[1] markets. The suits were consolidated in a single action in the District Court in Idaho. (*In re Albertson's, Inc. Employment Practices Litigation*, MDL No. 1215 ("the federal case").) In that action, current and former Albertsons's employees asserted numerous claims regarding Albertsons's labor practices. As relevant to the instant case, plaintiffs in the federal case alleged that Albertsons's hourly employees worked off the clock and were not compensated for that work. The basic theory was that many Albertsons employees, specifically those who worked in "production" jobs behind the scenes, were given lengthy task lists to accomplish, and told that Albertsons would not pay overtime. Given tasks which could not be accomplished in the time allotted, and the prohibition on overtime, employees felt pressured to complete the tasks on their own time, and would work off the clock.

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[1] Albertsons previously spelled its name "Albertson's," but has since eliminated the apostrophe.

Substantial discovery was conducted, including depositions of many plaintiffs. At a time when class certification was still a disputed issue in the federal case, the parties reached a settlement. Pursuant to the terms of the settlement, the parties agreed to a settlement class to consist of current and former Albertsons's employees "with off-the-clock claims who are not specifically excluded from the settlement . . . and who worked for [Albertsons] during the applicable relevant time periods . . . ."[2] Members of the class would be subject to a simplified claims procedure by which they could obtain compensation for their off-the-clock work by submitting sworn proofs of claim.

The parties stipulated that "certain job classifications should not be covered by the settlement." These were employees in eleven different job categories, including "front end clerks."[3] According to the parties' memorandum in support of the joint motion for preliminary approval of the settlement, "the basic rationale for the exclusions is the significant difference in the employment circumstances of these employees." As the parties' explained, "The largest group of excluded employees includes those generically referred to as 'front end clerks' (e.g., cashiers, courtesy clerks, lobby clerks, and courtesy booth clerks). Unlike the included employees, front end clerks have no task assignments on which labor scheduling is based, and neither they nor their

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[2] Other classes were certified with respect to unpaid overtime for managers and injunctive relief. Neither class is relevant to the instant action.

[3] As front end clerks comprised the bulk of employees excluded from the settlement, the parties often use "front end" to describe all such excluded employees. We follow the convention.

managers (who are included in the settlement) receive bonuses based on the achievement of labor or production goals. Front end clerks are further required to perform a relatively limited range of tasks, usually under close supervision from the manager, and are subject to an inflexible and closely monitored schedule. Although the parties do not contend that off-the-clock work is nonexistent in these positions, anecdotal and statistical evidence complied by both sides indicates that the incidence of such work among front end clerks as a group is so low as to justify their exclusion from this class and collective settlement."

The parties agreed that claims of individuals excluded from the settlement would not be extinguished, and the statutes of limitation on their claims would continue to be tolled until final court approval of the settlement. The parties also agreed to procedures by which individuals could claim they had been misclassified into a job category excluded from the settlement when they had actually worked in an included category.

After the settlement of the federal case, numerous suits were filed against Albertsons by employees who had either been excluded from the settlement or who had opted out of it. We refer to these actions collectively as "the individual actions." The instant action began as another individual action, in which thirteen current and former employees each sought individual relief against Albertsons for their off-the-clock work.

On November 3, 2003, plaintiffs filed a first amended complaint which added two named plaintiffs, Bryan Callan and Michael Bokelman, who alleged claims on behalf of themselves and a class. Specifically, Callan and Bokeman sought to proceed on behalf of "all current and former employees of [Albertsons] who worked off the

clock during the applicable limitations period in one or more positions . . . that were included under the settlement in [the federal case], and in one or more positions that were excluded under the settlement but who made a claim in that settlement for off-the-clock work performed while classified in positions both included and excluded from the settlement, such recovery limited in this action . . . only for off-the-clock work performed in such excluded positions." The complaint itemized eight purported common questions of fact, including, "[w]hether [Albertsons has] engaged in a pattern or practice of encouraging the plaintiffs and the class members not to report, and discouraging them from reporting, all time worked."

On October 25, 2004, Callan and Bokelman moved for certification of the class. By this time, the proposed class definition had changed slightly. Callan and Bokeman sought certification of the class of "[c]urrent and former employees of Albertsons in California who (1) were classified as working in multiple positions, some of which were included under the [s]tipulation of [s]ettlement in [the federal case] and some of which were excluded, and (2) made a claim in the [s]ettlement declaring under penalty of perjury that they worked off the clock while classified in one or more positions, some or all of which were excluded by, and therefore not compensable under, the [s]ettlement."

Callan and Bokelman, who are represented by the same counsel who had represented the plaintiffs in the federal case, argued that certification was proper because all members of the putative class worked off the clock and that Albertsons had actual or constructive knowledge of the off-the-clock work. Callan and Bokelman argued that off-the-clock work was rampant at Albertsons. They argued that their

"allegations of widespread off-the-clock work of which Albertsons had actual and constructive knowledge [were] supported by: (i) the testimony of the two representative plaintiffs, Callan and Bokelman;[4] (ii) excerpts from depositions of 21 of the plaintiffs in [the federal case] and 52 of the plaintiffs in [the individual actions] whom Albertsons elected to depose; (iii) 5,000 off-the-clock claims made prior to the settlement in [the federal case[5]]; (iv) 6,000 off-the-clock claims made in the settlement (some of which are from the same claimants); (v) examples of the hundreds of detailed sworn statements obtained by plaintiffs' counsel from Albertsons' employees in [the federal case]; (vi) a sharp increase in Albertsons' labor costs following commencement of [the federal case]; (vii) Albertsons' loss prevention records; [and] (viii) other documents filed in support of plaintiffs' motion for class certification in [the federal case].[6] The

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[4] The accompanying declaration indicates both depositions, in their entirety, were submitted in support of the motion for class certification. The depositions are in the form that includes six deposition pages reduced in size to fit on a single page. The appellants' appendix contains Bokelman's entire deposition. Callan's deposition, as included, contains only every *other* page – or, more precisely, every other six pages. It is not clear whether this was an error in preparing the appellants' appendix or if the trial court was provided with a similarly defective copy. In any event, we can see no difference the missing pages of Callan's deposition could make to the result of this appeal.

[5] The reference here is to "back pay claim forms" submitted to plaintiffs' counsel, seeking assistance in recovering from Albertsons.

[6] One such document is a Department of Labor investigation report. The trial court, in this action, held this document inadmissible and did not consider it in connection with the motion for class certification. On appeal, Callan and Bokelman argue the report supports their case, without challenging the trial court's ruling on admissibility. We disregard the document.

existence of off-the-clock work is confirmed by surveys performed during the 1990's, the last one showing that over 70% of former employees in California performed at least some off-the-clock work." (Footnotes omitted.)

With the exception of the depositions of Callan and Bokelman, most of the evidence submitted in support of the motion for class certification in this action was obtained or prepared in connection with the motion for class certification in the Idaho action, and the remainder was obtained in the litigation of the individual actions. Indeed, it is difficult to determine if *any* of the depositions or declarations, other than those of Callan and Bokelman, are from members of the putative class. Many clearly are not. The plaintiffs in the individual actions are *not* members of the putative class by definition. Other depositions and declarations are from individuals who worked *solely* in positions that were included in the settlement, while others are from individuals who worked for Albertsons *outside* of California.[7] In short, Callan and Bokelman's motion, and the evidence supporting it, was based on the proposition that off-the-clock work existed at Albertsons *in general*; not that the plaintiff class *in particular* worked off the clock. Their memorandum of points and authorities stated, "Off-the-clock work occurred primarily among employees who faced production standards, i.e., complete allotted tasks. Albertsons conditioned the payment of substantial bonuses for managers on meeting these production standards. Off-the-clock work occurred because these

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[7] Moreover, the record is wholly devoid of evidence indicating whether *any* of these individuals submitted proofs of claim in the federal case for off-the-clock work in included and excluded positions.

production standards could not be accomplished within the labor budgets allotted by corporate management and therefore employees faced the risk of unfavorable work schedules or loss of promotional opportunities." (Footnotes omitted.) The memorandum further stated, "By and large cashiers did not work off the clock while cashiering, because their work was to check during a particular shift, rather than complete an allotted set of tasks." Callan and Bokelman made *no* effort to demonstrate how the putative class members were in any way different from other front end employees who worked off the clock only rarely. They simply argued that off-the-clock work was frequent at Albertsons, due to Albertsons's way of assigning work to *production* employees, and that all members of the putative class asserted that they, *too*, had worked off the clock.

We take a moment to address the specific facts surrounding the claims of the representative plaintiffs themselves. Callan was classified as a front end clerk (a position excluded from the federal case settlement) yet he believed that, during this time, he was actually employed as a grocery clerk (an included position). Callan believed he was misclassified and had followed the procedures of the federal case settlement to be reclassified into the grocery clerk position. Bokelman sought compensation for off-the-clock work performed when classified as a front end clerk. He stated that he occasionally worked off the clock when he was a checker. He testified

that, when he did so, it was because he had been given a specific assignment, not that he had too much checking to do.[8]

In opposition, Albertsons argued that class certification was inappropriate because individual issues predominated. Given that Callan and Bokelman conceded that off-the-clock work was rare for employees in front end job classifications, Albertsons took the position that each member of the putative class who alleged off-the-clock work in such a classification must have done so due to unique circumstances that would be the subject of individual proof. In short, Albertsons argued that since off-the-clock work was the exception rather than the rule for employees in the positions held by members of the proposed class, plaintiffs could not proceed by establishing a general rule of off-the-clock work at Albertsons, and would instead have to prove each individual exception.[9]

In reply, Callan and Bokelman made two arguments. First, they argued that, although off-the-clock work may have been rare among the entire universe of front end clerks, off-the-clock work was *common* to each individual in the putative class because

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[8] At oral argument on appeal, Callan and Bokelman subsequently made an argument which implied that the putative class consisted of individuals who worked in excluded and included positions *simultaneously*. As both Callan and Bokelman sought compensation for time when they were *exclusively* categorized as working in excluded positions, it appears that the class definition was meant to encompass employees who worked in excluded and included positions *consecutively*.

[9] Albertsons also argued that since Callan took the position he had been *misclassified* as a front end clerk, he was not an appropriate class representative for the putative class of individuals who had *actually* worked in front end positions.

they all claimed to have worked off the clock. Callan and Bokelman stated, "The putative class consists of current and former employees in California who filed claims in [the federal case] settlement declaring under penalty of perjury that they worked off the clock while classified by Albertsons in positions that are excluded from (and thus ineligible for payment under) the [s]ettlement. In other words, by definition, all putative class members swear that they worked off the clock, regardless of how Albertsons assigned their job classification. Therefore, even though the incidence of off-the-clock work among 'front end clerks as a group' may be lower than among 'production' employees as a group, that difference is irrelevant to this motion seeking to certify a putative class of which one hundred percent (100%) swear that they worked off the clock."

Second, Callan and Bokelman argued that members of the putative class were similar to production employees in that, even though they had been classified in front end jobs, they had been assigned certain production-type job duties. Their theory was that members of the plaintiff class faced production demands even though they were "nominally classified" in front end positions.[10]

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[10] At one point, Callan and Bokelman suggested this result occurred due to a "quirk" in the language of the settlement agreement. It appears that the parties to the federal case agreed that if an employee worked in two jobs during the same week, the employee was considered to be employed in the position in which the majority of work was done. The implication is that if an employee worked less than 50 percent of his hours in production work, he could not recover in the settlement for any off-the-clock work just because he worked more hours in a front end position. Callan and Bokelman do not pursue this argument on appeal, perhaps because the plaintiff class they sought to

After a hearing, the trial court denied the motion for class certification, on the basis that individual issues predominated over class issues.[11] Callan and Bokelman appeal.

ISSUE PRESENTED

The sole issue presented by this appeal is whether the trial court abused its discretion in denying the motion for class certification. Callan and Bokelman argue that the trial court's ruling was not supported by substantial evidence and was legally unsound. We disagree.

DISCUSSION

1. *Standard of Review*

We review a trial court's ruling on a motion for class certification for abuse of discretion. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) " 'Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification. . . . [Accordingly,] a trial court ruling supported by substantial evidence generally will not be disturbed "unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]," [citation] . . . . "Any valid pertinent reason stated will be sufficient to uphold the order."' [Citations.]" (*Id*. at

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certify was not defined in this manner, and neither Callan nor Bokelman would qualify to be a member.

[11] Additionally, the court found Callan to be an inappropriate class representative.

pp. 326-327.) Where a certification order turns on inferences to be drawn from the facts, we have no authority to substitute our decision for that of the trial court. (*Id*. at p. 328.)

2. *Class Certification*

"Code of Civil Procedure section 382 authorizes class actions 'when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . .' The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. [Citation.] The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. [Citation.]" (*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at p. 326.)

As to the first community of interest factor, the plaintiffs' "burden on moving for class certification . . . is not merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues *predominate*." (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1108.) "[I]n determining whether there is substantial evidence to support a trial court's certification order, we consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." (*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at p. 327.) "A trial court ruling on a certification motion determines 'whether . . . the issues which may be jointly

tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.'" (*Id*. at p. 326.) "It is well established that the necessity for an individual determination of damages does not weigh against class certification. The community of interest requirement recognizes that 'ultimately each class member will be required in some manner to establish his individual damages . . . .' " (*Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 742.) It is sufficient if the plaintiffs can establish that certain *practices* of the defendant "affected all of the members of the potential class in the same manner, [such that] all liability issues can be determined on a class-wide basis." (*Prince v. CLS Transportation, Inc.* (2004) 118 Cal.App.4th 1320, 1329; see also *Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th 319, 327-329 ["operating managers" and "assistant managers" alleged defendant employer's standard practice required them to perform work that would render them subject to overtime laws, despite defendant's characterization of such employees as exempt]; *Bell v. Farmers Ins. Exchange, supra,* 115 Cal.App.4th at p. 742 [similar].)

3. *Common Issues Do Not Predominate*

The trial court's conclusion that common issues do not predominate is supported by substantial, indeed overwhelming, evidence. While Callan and Bokelman argue their class should be certified due to the common questions relating to Albertsons's alleged practices which encouraged off-the-clock work, Callan and Bokelman *also* concede that those alleged practices encouraged employees in front end positions to work off the

clock *only in rare situations*. All members of the putative plaintiff class are members of the subset of Albertsons employees who worked in front end positions. In other words, all members of the putative plaintiff case concededly worked in positions that *were not* subject to Albertsons's alleged policies or practices that encouraged off-the-clock work. That Callan and Bokelman might be able to establish a common practice encouraging off-the-clock work in general is not relevant; we are here concerned with a plaintiff class that *indisputably* was not subject to any such common practice.

Callan and Bokelman attempt to argue around this problem by saying that, since all members of the proposed plaintiff class have sworn under penalty of perjury (on their claim forms in the federal case settlement) that they *had* worked off the clock, commonality is restored. Putting it another way, Callan and Bokelman argue that a common practice *must* exist because each member of the putative class was ultimately treated the same way (i.e. worked off the clock). The argument is meritless. A similar result does not mandate the existence of a common practice causing it. Without any assertion of a common *practice* of Albertsons that resulted in each member of the putative class working off the clock, the fact that each member of the class *did* work off the clock is insufficient to justify certification. Each plaintiff must establish that he or she was an exception to the rule of no off-the-clock work for employees in front end positions. That there may have been many such exceptions does not justify class treatment, when plaintiffs cannot show a *common practice* that resulted in all of the exceptions collectively.

The closest Callan and Bokelman come to asserting such a practice is the argument, first raised in their reply memorandum in support of certification, that all members of the putative class faced "production-style" tasks even though they were classified in non-production jobs. Yet, here, Callan and Bokelman have again completely failed to establish commonality. There is no evidence that any *particular* type of front end employees were *uniformly* given production-style assignments. Instead, they offer only anecdotal evidence that *some* front end employees were assigned production-style tasks outside of the duties to which front end employees were generally assigned. All of the evidence suggests there is no common practice by which select front end employees were assigned production-style tasks and others were not.[12] In the absence of any such policy or practice, plaintiffs cannot establish liability by common proof, and class certification was properly denied.

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[12] The putative plaintiff class includes employees who had worked in excluded and included positions consecutively. Purely anecdotal evidence suggests that it *may be* that Albertsons had a policy of assigning "production-style" tasks to workers in front end jobs who had previously held production positions. Callan and Bokelman never asserted such a common policy, and did not submit evidence to support its existence.

DISPOSITION

The order denying class certification is affirmed. Albertsons's shall recover its costs on appeal.

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CROSKEY, Acting P.J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.